Vielma v. Exult

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INTRODUCTION

Exult, Inc. and individual officers and employees thereof (collectively Exult) appeal from an order denying their petition to compel the arbitration of the claims Ben Vielma (Vielma) set forth in the complaint filed on February 3, 2003. The complaint alleges fraud, negligent misrepresentation, unfair business practices, the violation of public policy and promissory estoppel, all of which claims arise from Exult's termination of Vielma's employment.

When Vielma accepted Exult's offer of employment, he agreed in writing that his employment would "be governed by this letter and the New Hire Information Sheet, consisting of four . . . pages, attached to this letter as Exhibit 1." The New Hire Information Sheet contains an arbitration provision. Vielma acknowledged in writing receiving "a copy of this Exhibit 1 setting forth terms that govern my employment with Exult, Inc." Exult based its petition for arbitration upon the arbitration agreement thus created. The trial court ruled that Exult's demand for arbitration was untimely.

On appeal, Exult contends the arbitration agreement is enforceable and the trial court exceeded its jurisdiction in deciding the question of timeliness. Inasmuch as the arbitration agreement is not unconscionable and the question of timeliness is one for the arbitrator to decide, we agree. We therefore reverse the order denying Exult's petition to compel arbitration and remand the matter for further appropriate action.

DISCUSSION [1]

We review independently "the legal question whether the [AAA's rules] required the court to grant appellants' motion to compel arbitration. [Citations.]" (Omar v. Ralphs Grocery Co. (2004) 118 Cal.App.4th 955, 959.) For guidance in determining this question, the Omar court turned to Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79.

The Omar court stated, "As the court in Howsam explained, the phrase `question of arbitrability' has a limited scope and applies only `in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter.' (Howsam, supra, 537 U.S. at p. 83.) `Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a "question of arbitrability" for a court to decide. . . . Similarly, a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court.' (Id. at p. 84.)" The court also instructed that issues of substantive arbitrability are for a court to decide while issues of procedural arbitrability are for an arbitrator to decide. (Ibid.) Such procedural issues to be decided by an arbitrator include allegations of waiver and delay and whether prerequisites such as time limits, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate have been met. (Ibid.)" (Omar v. Ralphs Grocery Co., supra, 118 Cal.App.4th at p. 960.)

In short, where the parties have opted out of California's statutory arbitration system by adopting the AAA or other arbitration rules, as the statutory system allows them to do (see, e.g., Code Civ. Proc., §§ 1282, 1282.2), issues concerning contract interpretation and arbitration procedures are subjects more proper for an arbitrator to determine, rather than a court (Omar v. Ralphs Grocery Co., supra, 118 Cal.App.4th at p. 964). Here, the parties agreed to resolve employment disputes or claims "exclusively by final and binding arbitration before a single arbitrator in accordance with the then existing Rules and Regulations of the [AAA]."

The provision of the AAA's National Rules for the Resolution of Employment Disputes applicable when plaintiff signed the employment agreement was Rule 4(b)(i)(1) (effective Jan. 1, 1999; superseded as of Jan. 1, 2001). It provides that the party initiating arbitration shall "[f]ile a written notice (hereinafter `Demand') of its intention to arbitrate at any regional office of the AAA, within the time limit established by the applicable statute of limitations if the dispute involves statutory rights. If no statutory rights are involved, the time limit established by the applicable arbitration agreement shall be followed. Any dispute over such issues shall be referred to the arbitrator." Rule 4(b)(i)(1) (effective November 1, 2002), as it existed when defendant petitioned to compel arbitration, is identical.

In summary, the parties clearly agreed to submit the issue of whether there had been a timely demand for arbitration, which involves construction of the arbitration agreement in light of the procedural AAA rules incorporated therein, to the arbitrator. If the arbitration agreement is enforceable, therefore, the trial court must grant the motion to compel arbitration in order to allow the arbitrator to determine the question of timeliness. We turn next to the question of whether the agreement is unenforceable due to unconscionability. [2]

Minimum Requirements for Fairness

As noted in Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, "a mandatory employment arbitration agreement . . . is lawful if it `(1) provides for neutral arbitrators,

(2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, (5) does not require employees to pay either unreasonable costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum. Thus, an employee who is made to use arbitration as a condition of employment "effectively may vindicate [his or her] statutory cause of action in the arbitral forum."' [Citation.]" (At p. 102.) As we shall demonstrate, the arbitration agreement at issue in this case meets each of these requirements.

(1) The arbitration agreement provides that any employment-related "disputes, disagreements, claims or controversies . . . shall be resolved exclusively by final and binding arbitration before a single arbitrator in accordance with the then existing Rules and Regulations of the American Arbitration Association." Rule 1 of the AAA's National Rules for the Resolution of Employment Disputes, as it existed when plaintiff executed the employment agreement and as it existed when defendant demanded arbitration, makes those rules applicable whenever the parties have requested AAA arbitration. Rule 11, which also uses identical language in both of its incarnations, guarantees the neutrality of the arbitrator. By providing for arbitration under AAA rules and regulations, the arbitration agreement thus establishes that there will be a neutral arbitrator. (Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 Cal.4th at p. 102.)

(2) Rule 7 of the National Rules for the Resolution of Employment Disputes, in both of its incarnations, provides, "The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." The arbitration agreement consequently provides for "`"more than minimal discovery."'" (Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 Cal.4th at pp. 102, 104-106.)

(3) The arbitration agreement specifically provides that "[t]he arbitrator shall issue a written decision which specifies the findings of fact and conclusions of law on which the arbitrator's decision is based." Rule 34(c), in both of its incarnations, is closely similar. In addition, the agreement provides that the award, although final and binding, is "subject to judicial review as required by law." These provisions satisfy the requirement of a written award subject to judicial review. (Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 Cal.4th at pp. 102, 106-107.)

(4) The arbitration agreement expressly states that "[t]he parties shall be entitled . . . to obtain all remedies available to the parties as if the matter had been tried in court (including, without limitation, the award of attorneys' fees to the prevailing party if authorized by statute)." It also preserves statutes of limitation for such matters as a continuing violation under FEHA, which has been held to be essential (Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1175), by requiring a request for arbitration to be made "within one year of the date on which the dispute first arose (unless a longer period of time is required by law)." (Italics added.) These provisions satisfy the

equal remedies requirement. (Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 Cal.4th at pp. 102, 103-104.)

(5) The arbitration agreement requires each party to pay his/its "own costs of arbitration" except that the employer "shall pay such costs of arbitration if it is required to do so to make this agreement enforceable." This meets the dictates that employees not be required to pay unreasonable arbitration costs and that those stating FEHA claims not be required to pay any costs of arbitration beyond those costs they would incur in court. (Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 Cal.4th at pp. 102, 107-113.)

In summary, the instant arbitration agreement meets the minimum requirements for enforceability. The remaining question, then, is whether it is unconscionable under general principles of law.

General Unconscionability

The analysis of whether an agreement is unconscionable begins with a determination of whether it constitutes a contract of adhesion. (Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 Cal.4th at p. 113.) We shall assume for the sake of argument that the mandatory employment arbitration agreement is adhesive on the ground that it was imposed on employees as a condition of employment by an employer of superior bargaining power and, standing as it did between a comparatively weak employee and a necessary job, there was acute economic pressure to agree. (Id. at pp. 114-115.)

An adhesive contract provision is unconscionable if it does not fall within the weaker party's reasonable expectations or it is unduly oppressive. (Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 Cal.4th at p. 113.) The concept of unconscionability has both procedural and substantive elements. A contract provision is procedurally unconscionable if it imposes oppression or surprises the weaker party. It is substantively unconscionable if it is unduly harsh or it applies only unilaterally. (Id. at p. 114.) Both aspects of unconscionability must be present for the provision to be unenforceable. (Ibid.)

A contract provision is oppressive if an inequality of bargaining power between the parties precludes the weaker party from enjoying a meaningful opportunity to negotiate and choose the terms of the contract. (Stirlen v. Supercuts, Inc. (1997) 51 Cal.App.4th 1519, 1532.) By definition, then, any contract of adhesion is procedurally unconscionable. The question thus remains whether the arbitration agreement is substantively unconscionable.

Fairness requires a "`modicum of bilaterality' in an arbitration agreement. Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee . . . ." (Armendariz v. Foundation

Health Psychcare Services, Inc., supra, 24 Cal.4th at p. 117.)

The arbitration agreement in Armendariz "was limited in scope to employee claims regarding wrongful termination. Although it did not expressly authorize litigation of the employer's claims against the employee, . . . such was the clear implication of the agreement." (Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 Cal.4th at p. 120.) The instant arbitration agreement differs.

The agreement requires both employer and employee to arbitrate all disputes arising out of the employment relationship except those pertaining to unemployment and workers' compensation claims, which are subject to state administrative action. While covered claims include those related to wrongful termination, they extend beyond this. In addition to assertions of wrongful termination, public policy violation, harassment, discrimination and infliction of emotional distress, the parties must arbitrate breach of contract, defamation and fraud claims, as well as any other conceivable employment-related claims under federal, state or local law. Both parties may breach a contract, and either party may defame the other or engage in fraud.

In short, there is a "`modicum of bilaterality'" in this arbitration agreement, however unlikely it may be that the employer actually will seek arbitration of an employment-related claim against an employee such as Vielma as opposed to a member of upper management. The agreement therefore is not one-sided. Given the procedural protections afforded an employee, as discussed ante, it is not unduly harsh. Inasmuch as the agreement is neither one-sided nor unduly harsh, it is not substantively unconscionable. Lacking this element, it is enforceable. (Armendariz v. Foundation Health Psychcare Services, Inc., supra, 24 Cal.4th at p. 114.) [3]

The order denying the employer's petition to compel arbitration is reversed. The trial court is directed to enter a new and different order granting the petition and to stay further action in this proceeding. Respondent Exult is to recover its costs on appeal.

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We concur:

ORTEGA, J.

MALLANO, J.

1. We will set forth the provisions of the arbitration agreement as they aid the discussion.

2. The trial court was asked to but did not decide this issue. Inasmuch as it is purely a question of law, however, turning on incontrovertible and unalterable facts, we would review it independently had the trial court done so. (Cf. Waller v.

Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, 18.) Under these circumstances, which are similar to those in which an appellant raises an issue or presents a theory for the first time on appeal, we may decide the issue in the first instance. (Cf. Ward v. Taggart (1959) 51 Cal.2d 736, 742; Xiloy- Itzep v. City of Agoura Hills (1994) 24 Cal.App.4th 620, 633.)

3. Vielma's argument that his statutory claim under Business and Professions Code section 17200 et sequitur is not subject to arbitration is misplaced. This case does not involve a union- negotiated waiver of the right to pursue a claim in a judicial forum and thus does not require that such a waiver be clear and unmistakable. (Wright v. Universal Maritime Service Corp. (1998) 525 U.S. 70, 80- 81.) It is enough here that the arbitration agreement is enforceable. (See, e.g., Brookwood v. Bank of America (1996) 45 Cal.App.4th 1667, 1673- 1674; Spellman v. Securities, Annuities & Ins. Services Inc. (1992) 8 Cal.App.4th 452, 464- 465.)